No. 18551

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

On May 23, 1962, the Federal Grand Jury for the Southern District of California, Central Division, returned a six count indictment against the appellants Howard P. Carroll and H. Carroll & Co. Each count alleged a violation of Title 15, United States Code, Section 77q(a). [C. T. 2-12.][1] On June 25, 1962, appellants entered a plea of not guilty to all six counts. [C. T. 15.] Trial commenced on November 1, 1962 [C. T. 132] and on November 9, 1962, the jury found appellants guilty on all counts. [C. T. 257-259.] On December 17, 1962, appellant Howard P. Carroll received a suspended sentence, was placed on probation for one year, and was fined $2,500. Appellant H. Car-

[1] "C. T." refers to Clerk's Transcript of Record.

roll & Co. was fined $300. [C. T. 345-347.] Timely Notices of Appeal were filed by appellants on December 26, 1962. [C. T. 351-354.]

The jurisdiction of the United States District Court for the Southern District of California, Central Division, was based on Title 15, United States Code, Section 77q(a) and Title 18, United States Code, Section 3231.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II.

STATUTES INVOLVED.

Title 15, United States Code, Section 77q(a) reads as follows:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> "(1) to employ any device, scheme, or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Title 18, United States Code, Section 3282, reads as follows:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. . . ."

Title 28, United States Code, Section 1732, reads in pertinent part as follows:

> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business,' as used in this section includes business, profession, occupation, and calling of every kind."

III.

STATEMENT OF THE CASE.

A. Question Presented.

It is to be noted that appellants originally presented 78 issues upon which they intended to rely [C. T. 355-363], but their brief, which was served on the Government on June 27, 1963, presents only 13 issues for consideration, assertedly because of space limitations. (Appellants' Br. pp. 425-28.)

In order to avoid needless repetition the appellee will analyze the propositions presented by the appellants' brief in the following order:

A. The appellants' pre-trial motion to strike surplusage in the indictment was properly denied by the trial court.

B. The prosecution of Counts 1, 5 and 6 of the indictment was not barred by the Statute of Limitations.

C. The testimony of Ralph Frank concerning a telephone call to H. Ward Dawson was properly received in evidence.

D. There was no error committed in the procedures employed by the trial court.

E. There is sufficient evidence to sustain the conviction of the appellants on all counts.

F. The trial court did not commit error in the admission of documentary evidence.

G. The trial court did not commit error in its instructions to the jury.

B. Statement of Facts.

This case in substance involves the activities of Howard P. Carroll and H. Carroll & Co. in sales to the public of Comstock Ltd. stock at manipulated market prices.

Comstock, Ltd. was a stock listed on the San Francisco Mining Exchange. This company as it existed during the times mentioned in the indictment was the product of a merger between Country Club Charcoal of Nevada, successor to the defunct Country Club Charcoal of California, and Comstock Ltd.

At the time of this merger, a syndicate headed by David Alison, an entrepreneur, acquired from Archie Chevrier, a promoter of the merger and a member of the San Francisco Mining Exchange, an option to purchase 500,000 shares of Comstock Ltd. stock at 25 cents a share in exchange for a $125,000 note. The optioned stock was placed in escrow at Securities Transfer Corporation, Denver, Colorado.

Thereafter, H. Carroll & Co., through its Denver and Beverly Hills offices, sold 313,000 shares of the escrowed stock (25-cent stock) to the public at manipulated market prices ranging from 30 cents to 35 cents a share. A fraudulent brochure was used as part of the scheme.

The facts in detail as revealed at trial are as follows:

During the latter part of 1956 David Alison and his wife had an interest in a ranch located in Ventura County called Rancho Cola. This ranch was in the process of going through a Chapter XI Bankruptcy

proceeding and was controlled by an organization formed by the Bankruptcy Court which was known as "V-R Ranch". [R. T. 77, 117, 128.][2]

David Alison decided to produce charcoal from the oak trees on the ranch in Ventura County. This decision led to the formation of Country Club Charcoal of California. Country Club Charcoal of California went defunct and Country Club Charcoal of Nevada was organized under the direction of T. R. Gillenwaters in late 1956. [R. T. 77-80, 148.]

In either late 1956 or early 1957 Country Club Charcoal of Nevada merged with Comstock Ltd. Archie Chevrier, a member of the San Francisco Mining Exchange aided in the merger. [R. T. 82-84.] In order to control Comstock Ltd., and in order to get operating capital, David Alison was given an option to purchase 500,000 shares of Comstock Ltd., at 25 cents per share. Alison and his associates gave Archie Chevrier a note for $125,000 and in return Alison received 500,000 shares of Comstock Ltd. [Ex. 1; R. T. 85, 87-89, 155.]

T. R. Gillenwaters recommended that Alison contact a Denver broker named Howard P. Carroll. [R. T. 511.]

Howard P. Carroll in 1957 was President and owned the controlling interest in H. Carroll & Co., a brokerage house with its main office in Denver, Colorado.

Robert Leopold was Vice President and owned 15% of the company. Leopold was primarily a salesman. [R. T. 249-250, 254, 283.] Gerald M. Greenberg owned

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[2]"R. T." refers to Reporter's Transcript.

9% of H. Carroll & Co., and was Treasurer. Greenberg was primarily a trader. [R. T. 255, 313, 336.] Clarence Scholz was employed as office manager. [R. T. 254-255, 362.] John Tice was employed as a trader. [R. T. 255, 346-347.] Liboslav Uhlir was employed as an accountant. [R. T. 467.]

During early 1957, a branch office of H. Carroll & Co. was opened in Beverly Hills, California. Martin McIntyre and Robert Alaska were in charge of the Beverly Hills Office.[3] [R. T. 239-240, 251, 255, 316.]

Ralph Frank, during early 1957, was the attorney representing H. Carroll & Co., in California. Frank was the resident agent for H. Carroll & Co., and also represented H. Carroll & Co., before the California Corporation Commission. [R. T. 258, 370, 672-673, 680.]

Los Angeles area investor orders of stock were handled in the following manner: An investor would order stock from a salesman; the order would be teletyped to Denver from the Beverly Hills Office; tickets would be made up in Denver from the teletype information; confirmations would be mailed to the investor from the Denver Office; the investor would mail his payment to the Denver Office; and the stock certificate would be mailed by the Denver Office to the investor. The paper work was handled in Denver because the Beverly Hills Office was primarily a sales office. [R. T. 246, 251-253, 315-316.]

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[3]The following salesmen worked in the Beverly Hills Office: Robert Alaska [Ex. 36]; Martin McIntyre [Ex. 37] Frank Hicks [Ex. 38]; John Llewellyn [Ex. 39] Irving Marems [Ex. 40]; Elmo Moen [Ex. 41]; Milton Miller [Ex. 86]; Harold Anderson [Ex. 87]; and Jane Suttle [Ex. 103];

Howard P. Carroll, during 1957, was in direct control of H. Carroll & Co., and made all of the policy decisions. Carroll approved all bills by initialling them and also closely supervised the trading activities. He approved the tickets and if he happened to be away the tickets were left on his desk until his return. [R. T. 251, 260, 317-318, 349, 364-365, 369, 376.]

In late 1956 or early 1957 David Alison, T. R. Gillenwaters and Howard P. Carroll met in the Mayflower Hotel in Denver, Colorado. David Alison brought Howard P. Carroll up to date on the charcoal organization. A discussion took place concerning Comstock Ltd. Howard P. Carroll indicated that he wanted Robert Leopold on the Board of Directors of Comstock Ltd. [R. T. 90-94, 144-145, 157.]

A subsequent meeting concerning Comstock Ltd. was held in Reno, Nevada. Howard P. Carroll sent Robert Leopold to this meeting. David Alison was present. [R. T. 259, 295.] During this period of time Robert Leopold became an officer of Comstock Ltd. [R. T. 92, 259, 290, 356.]

The 500,000 shares of stock in Comstock Ltd. which Alison received from Archie Chevrier, in exchange for the $125,000 note, were deposited in an escrow at Securities Transfer Corporation in Denver, Colorado. Howard P. Carroll was given the option to withdraw the stock at 25 cents per share. [R. T. 367-368, 460-461, 468-469, 686-687.]

Robert Leopold, Gerald Greenberg and John Tice knew nothing about this escrow. [R. T. 256, 300-301, 327-328, 342-343, 355.]

At the Beverly Hilton Hotel, in Los Angeles, in early 1957, H. Carroll and Co. held a sales meeting

concerning Comstock Ltd. The Beverly Hills salesman attended this meeting. David Alison, T. R. Gillenwaters and Howard P. Carroll spoke concerning the charcoal industry and in particular the importance of raising funds. [R. T. 94, 96, 485-486, 608.]

During early 1957 Howard P. Carroll withdrew 313,000 shares of Comstock Ltd. stock at 25 cents per share from the Securities Transfer Corporation in Denver, Colorado. Approximately 286,800 shares of Comstock Ltd. were sold to California investors. [Ex. 27; R. T. 239, 367-368, 396-398, 460-461, 468-469, 712-716, 720.]

The money which Howard P. Carroll paid for the Comstock Ltd. stock escrowed at Securities Transfer Corporation in Denver, Colorado, was forwarded to H. Ward Dawson who in turn forwarded the money to David Alison. Approximately $10,000 to $12,000 was handled in this fashion. Dawson withdrew from the venture and Alison telephoned Howard P. Carroll in Denver and requested more money. Subsequently, Howard P. Carroll sent Alison $50,000 or $60,000. [R. T. 97-99, 101-104, 167, 395, 404.]

During the same period of time that Howard P. Carroll was withdrawing Comstock Ltd. stock from the escrow at Securities Transfer Corporation in Denver, Colorado, at 25 cents a share he purchased Comstock Ltd. stock on the San Francisco Mining Exchange. Howard P. Carroll during the period alleged in the indictment purchased approximately 87,000 shares of Comstock Ltd. stock through Archie Chevrier over the San Francisco Mining Exchange at prices varying from 27 cents to 36 cents a share. [Exs. 104, 106; R. T. 368-369, 375, 460-461, 468, 715-716, 728-729,

733, 736.] During the period alleged in the indictment approximately 131,000 shares of Comstock Ltd. stock were sold over the San Francisco Mining Exchange to the investing public. [Exs. 32, 33, 34, 79, 106.]

Robert Alaska, one of the managers of the Beverly Hills Office of H. Carroll & Co. told Irving Marems, a salesman, that H. Carroll & Co. did the underwriting in Comstock Ltd. and that the subscription had not been completed and H. Carroll & Co. was trying to finish out the underwriting. [R. T. 573.] Clarence Scholz, office manager of the Denver office of H. Carroll & Co., told Liboslav Uhlir, the accountant, that Comstock Ltd. stock was purchased on the San Francisco Mining Exchange to maintain the market. [R. T. 472.]

Howard P. Carroll told Clarence Scholz that ". . . we were going to have executed a trade on the exchange so the price would be printed in the newspaper, . . ." [R. T. 375, 380.]

A teletype message was sent by Robert Leopold at the direction of Howard P. Carroll, from the Denver office of H. Carroll & Co. to the Beverly Hills office. That teletype reads in pertinent part as follows:

> "OK KID BEEN WORKING LIKE A DEMON COMSTOCK WILL BE 33-40 IN FEW MINUTES AS SOON AS EXCHANGE OPENS WE HAVE IT WORKED OUT NOW AND IF YOUR BOYS GOING TO SELL ANY THEY SHOULD DO IT QUICK LIKE WE ARE GOING TO DO EVERYTHING IN OUR POWER TO MAINTAIN MARKET AT THIS LEVEL . . ." [Ex. 44, R. T. 275.]

In the early part of 1957, Howard P. Carroll employed Ken Raetz as a publicity man. Around March 11, 1957, Raetz prepared and submitted an outline of a promotional program for Howard P. Carroll. [Ex. 5.]

On March 26, 1957, Raetz sent a telegram to Howard P. Carroll requesting funds for advertising. Shortly afterwards Raetz received $2,500. from Howard P. Carroll. [Exs. 15, 16; R. T. 372-373, 520, 522, 553.]

In early April of 1957, Raetz prepared a press release concerning the charcoal industry for Howard P. Carroll which was released to Los Angeles area news media. [Ex. 6; R. T. 525.]

Raetz prepared the charcoal brochure for use as selling literature. The charcoal brochure was discussed by Raetz with T. R. Gillenwaters, David Alison and Ralph Frank. Raetz paid for the charcoal brochure with funds which had been provided by Howard P. Carroll. Three or four copies of the charcoal brochure were sent to David Alison and the remainder of the 2500 brochures were sent to Howard P. Carroll in Denver. [Exs. 57, 84, 85, 93; R. T. 113-116, 135, 244, 268-270, 322, 365-366, 487, 491, 505, 511, 518-519, 531-532, 534-535, 540, 556-557.]

The charcoal brochure was examined by Ralph Frank for H. Carroll & Co. and then was presented to the California Corporation Commission for consideration as selling literature. The California Corporation Commission disapproved the brochure. [R. T. 675, 677, 680-681.]

Notwithstanding the disapproval, salesmen from the Beverly Hills office of H. Carroll & Co. used the char-

coal brochure in selling shares of Comstock Ltd. to the investing public. [R. T. 418, 425, 563, 575, 586, 592, 608-610, 675.]

Contrary to representations in the charcoal brochure [Exs. 57, 84, 85], David Alison stated that: He was *not* a prosperous Ventura rancher [R. T. 117]; he did *not* permit itinerant charcoal burners to use his ranch to burn charcoal [R. T. 118]; Comstock Ltd. was *not* the largest producer of charcoal in the west [R. T. 118, 133-134]; kilns did *not* hold 12 cords and after ten days of burning produce 8 tons of charcoal [R. T. 122]; lease acquisitions, machinery and labor did *not* chew away the greater part of $165,000 [R. T. 123]; Country Club Charcoal and Comstock Ltd. did *not* make a profit [R. T. 124, 133, 179]; *no one* aided Alison in the sale and production of charcoal [R. T. 125]; *no one* aided Alison in the financial area [R. T. 125]; *no* engineers re-evaluated the production problems [R. T. 131]; 6012-cord kilns were *never* built in the Paso Robles area [R. T. 133]; and the stumpage contracts which David Alison acquired [Exs. A and B], were the only assets traded by Country Club Charcoal to Comstock Ltd. [R. T. 128.]

Another press release was prepared by Raetz in early May of 1957. The press release and the charcoal brochure were sent to various news media in the Los Angeles area. [Ex. 7.]

In the latter part of June of 1957, messages were sent by teletype between the Denver office and the Beverly Hills office of H. Carroll & Co. concerning the charcoal brochure. Those teletypes read in pertinent part as follows:

"DEN IS BOB LEOPOLD TERE I WEED BROCHURES ON COMSTOCK LTD VERT BADKT BADLY PLEASE SEND US SME VIA AIR MAIL IF YOU HAVE SOUNE . . . OK I LOOK FOR SOME COMSTOCK BROCHURES AND GET THEM OUT TODAY . . ." [Ex. 47.]

". . . WE ARE SENDING SPECIAL DELIVERY ABOUT 50 COMSTOCK BROCHURES THAT IS ALL WE HAVE LEFT FORGOT WE SENT OURS TO NEW YORK . . ." [Ex. 46.]

". . . TELL BOB WE FINALLY GOT THE BROCH ON COMSTOCK AT 7 PM LAST NITE AND THEY PUT A FEW IN THE MAIL TO BOB ATTENTION SPEC AIR MAIL ADN BALANCE WILL FOLLOW TODAY THEY SURE ARE A TERRIFIC MAILING PIECE MAYBE THEY WORTH W WAITING FOR . . ." [Ex. 48.]

In April of 1957, Albert Bryer purchased 10,000 shares of Comstock Ltd. from Robert Alaska at 30 cents per share. Alaska told Bryer that Comstock Ltd. was a mining stock listed on the exchange, had land under option, and the price of Comstock Ltd. would double in six months. Alaska also showed Bryer the charcoal brochure. Alaska did not tell Bryer that his stock came from a Denver escrow at 25 cents per share and that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. [R. T. 424-425, 427-428, 440.]

Irving Marems sold Roberta Krell 10,000 shares of Comstock Ltd. in early 1957 at 30 cents per share. Prior to the sale Marems told Krell that Comstock Ltd. was a good stock, could double in price, and they were making a market. Prior to the purchase Krell was shown the charcoal brochure. Krell was not told

that the stock that she purchased came from a Denver escrow at 25 cents per share. [R. T. 559, 561-564.]

Mr. Willard Johnson purchased 1000 shares of Comstock Ltd. at 30 cents per share, in the latter part of April, 1957. Johnson purchased another 1000 shares of Comstock Ltd. at 32 cents per share, in the latter part of June, 1957. Milton Miller was the salesman from the Beverly Hills office of H. Carroll & Co. that Johnson dealt with. Prior to his first purchase Miller told Johnson that Comstock Ltd. was a good growth stock; had big orders; Carroll made the market and the stock would not go below the quoted price; Comstock Ltd. would go above 40 in a few weeks and would double in three to six months. Johnson did not know that his stock was purchased from a Denver escrow at 25 cents per share. [Exs. 68, 69; R. T. 409, 411, 413-414, 416, 418, 421.]

In the spring of 1957, Frank Hicks, a salesman for H. Carroll & Co., telephoned Robert Wisda and in discussing Comstock Ltd. said that the stock would go over $2.00 in the near future and that the stock was listed on the San Francisco Mining Exchange. Wisda purchased 500 shares of Comstock Ltd. at 32 cents per share. Wisda received his stock certificate dated May 27, 1957, from H. Carroll & Co. Wisda also received a receipt form dated May 31, 1957, from H. Carroll & Co. Wisda was shown the charcoal brochure and was also told that Carroll had a block of Comstock Ltd. but was not told that his stock came from an escrow in Denver at 25 cents per share. Likewise Wisda was not told that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. [Exs. 56, 94; R. T. 581-583, 587-588.]

Frank Hicks also sold Comstock Ltd. stock to Robert Indorf in May of 1957. Hicks told Indorf that the stock would go to around $1.00 per share from its price of 30 cents per share. Hicks also gave a charcoal brochure to Indorf. Hicks did not tell Indorf that H. Carroll & Co. had purchased the stock from a Denver escrow at 25 cents a share or that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. Indorf received his stock certificate dated June 20, 1957, in a brown H. Carroll & Co. envelope, postmarked June 27, 1957. [Exs. 60, 62; R. T. 591-594, 598.]

Elmo Moen sold Arnold Bloemsma 500 shares of Comstock Ltd. stock for $170. Moen showed Bloemsma the charcoal brochure prior to the sale. Moen did not tell Bloemsma that the Comstock Ltd. stock had been purchased from a Denver escrow at 25 cents a share or that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. Bloemsma received his stock certificate, dated June 17, 1957, in a brown H. Carroll & Co. envelope, postmarked June 21, 1957. [Exs. 67, 96; R. T. 601, 604-605, 608-610, 613.]

In the early part of June, 1957, John Llewellyn sold Marjorie Loar Graham 500 shares of Comstock Ltd. Graham was not told that H. Carroll & Co. purchased the stock that she bought from a Denver escrow at 25 cents a share or that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. [R. T. 617, 619.]

Raymond Wyatt purchased 2,500 shares of Comstock Ltd. at 30 cents per share and another 2,500 shares of Comstock Ltd. at 35 cents per share from

Jone Suttle. Suttle told Wyatt that the stock was being sold at the market price and was being purchased on the San Francisco Mining Exchange. Wyatt was not told that the stock was purchased from a Denver escrow at 25 cents a share or that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. [R. T. 663, 665, 667-668.]

Howard P. Carroll, in November of 1957, according to Marvin Greene, then an attorney for the Securities and Exchange Commission, stated that 500,000 shares of Comstock Ltd. had been transferred from Archie Chevrier to six individuals; the 500,000 shares of Comstock Ltd. were deposited in the Securities Transfer Corporation in Denver, Colorado; this deposit was under an arrangement whereby H. Carroll & Co. could withdraw these shares at 25 cents per share; and Howard Carroll said that he withdrew approximately 300,000 shares of Comstock Ltd. Howard P. Carroll also told Marvin Greene that during the same period of time he purchased shares of Comstock Ltd. on the San Francisco Mining Exchange. [R. T. 460-461.]

In April of 1962, Otto P. Gustte, an investigator for the Securities and Exchange Commission, contacted Howard P. Carroll at his office in Denver, Colorado, in an attempt to locate the purchase and sales journal of H. Carroll & Co. for the year 1957. At that time Howard P. Carroll told Gustte that the purchase and sales journal of H. Carroll & Co. had been burned at his direction in January of 1962. [R. T. 712-713.]

IV.

SUMMARY OF ARGUMENT.

A. The appellants' pre-trial motion to strike surplusage in the indictment was properly denied by the Trial Court.

B. The prosecution of Counts One, Five and Six of the indictment was not barred by the Statute of Limitations.

C. The testimony of Ralph Frank concerning a telephone call to H. Ward Dawson was properly received in evidence.

D. There was no error committed in the procedures employed by the Trial Court as to (1) alleged leading questions, (2) questions asked by the Trial Court, and (3) argument of objections in the presence of the jury.

E. There is sufficient evidence to sustain the conviction of the appellants on all counts. The charcoal brochure was materially false. The appellants made substantial purchases of Comstock Ltd. stock on the San Francisco Mining Exchange at prices ranging from 27 cents to 36 cents a share, while at the same time selling investors stock in Comstock Ltd. which had been withdrawn from a Denver escrow by the appellants at 25 cents per share.

F. The Trial Court did not err in the admission of documentary evidence in the case at bar.

G. The jury instructions were a complete concise statement of the law applicable to a case charging fraud in the sale of securities.

V.
ARGUMENT.

A. The Appellants' Pre-Trial Motion to Strike Surplusage in the Indictment Was Properly Denied by the Trial Court.

On October 29, 1962, two days before trial, the appellants filed a motion to strike certain language from the indictment as surplusage. [C. T. 91-96.] This motion was denied on October 30, 1962. [C. T. 131.] Appellants did not file a motion for Bill of Particulars.

A motion to strike allegations in an indictment as surplusage should not be granted unless it is clear that the allegations are not relevant and are prejudicial or inflammatory. *United States v. Bonnano* (D.C. S.D. N. Y. 1959), 177 F. Supp. 106, *rev'd* 285 F. 2d 408; *United States v. Garrison* (D.C. E.D. Wis. 1958), 168 F. Supp. 62d; *United States v. Oldham Company* (D.C. N.D. Cal. 1957), 152 F. Supp. 818; *United States v. Klein* (D.C. S.D. N. Y. 1954), 124 F. Supp. 476.

No showing was made to the Trial Court that the allegations complained of were irrelevant, prejudicial and inflammatory.

The Trial Court is allowed wide discretion in coping with motions to strike surplusage. *Gambill v. United States* (6 Cir. 1960), 276 F. 2d 180; *United States v. Courtney* (2 Cir. 1958), 257 F. 2d 944, *cert. den.* 358 U. S. 929.

The government respectfully submits that the Trial Court did not abuse its discretion in denying the motion to strike, which was filed two days prior to the commencement of trial.

B. The Prosecution of Counts One, Five and Six of the Indictment Was Not Barred by the Statute of Limitations.

The appellants contend that Title 18, United States Code, Section 3282, bars the prosecution and thus the conviction on Counts One, Five and Six must be reversed.[4]

The Grand Jury for the Southern District of California returned the indictment in this cause on May 23, 1962. [C. T. 2-12.]

Robert Wisda, the investor named in Count One, received a stock certificate for 500 shares of Comstock Ltd. dated May 27, 1957. [Ex. 94.] Wisda also received a receipt form from H. Carroll & Co. dated May 31, 1957. [Ex. 56.]

Investor Arnold Bloemsma, named in Count Five, received a stock certificate for 500 shares of Comstock Ltd. dated May 27, 1957. [Ex. 94.] Bloemsma also received a receipt form dated June 19, 1957. [Ex. 66.] The stock certificate and receipt form were mailed in a brown H. Carroll & Co. envelope, postmarked June 21, 1957. [Ex. 67.]

Robert Indorf, the investor named in Count Six, received a stock certificate for 500 shares of Comstock Ltd. dated June 20, 1957. [Ex. 64.] Indorf also received a receipt form dated May 27, 1957. [Ex. 61.] Indorf received the stock certificate and the receipt form in a brown H. Carroll & Co. envelope postmarked June 25, 1957. [Ex. 60.]

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[4]The trial court instructed the jury concerning the Statute of limitations. [R. T. 990.]

Title 15, United States Code, Section 77q(a), in pertinent part, reads as follows:

> "It shall be unlawful for any person in the *offer or sale of any securities* . . . by the use of the mails, directly or indirectly . . ." [Emphasis added.]

Title 15, United States Code, Section 77b(3), in pertinent part, reads as follows:

> "When used in this subchapter, unless the context otherwise requires— . . . (3) The term 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security, for value. The term 'offer to sell,' 'offer for sale,' or 'offer' shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. . . ."

The delivery of the security itself and the receipt form is a part of the sale. *United States v. Sampson* (1962), 371 U. S. 75; *Creswell-Keith, Inc. v. Willingham* (8 Cir. 1959), 264 F. 2d 76; *Schiller v. H. Vaughan & Co.* (2 Cir. 1943), 134 F. 2d 875; *Kopald-Quinn & Co. v. United States* (5 Cir. 1939), 101 F. 2d 608, *cert. den.* 307 U. S. 628; *United States v. Robertson* (D.C. S.D. N. Y. 1959), 181 F. Supp. 188, *aff'd* in part *rev'd* in part 298 F. 2d 739; *United States v. Monjar* (D.C. Del. 1942), 47 F. Supp. 421, *aff'd* 147 F. 2d 916, *cert. den.* 325 U. S. 859.

Delivery of the security is part of a sale of said security. Accordingly, the Government respectfully submits that the prosecution on Counts One, Five and Six was not barred by the Statute of Limitations.

C. The Testimony of Ralph Frank Concerning a Telephone Call to H. Ward Dawson Was Properly Received in Evidence.

During early 1957 Ralph Frank, an attorney who represented Howard P. Carroll and H. Carroll & Co. in California, had a telephone conversation with H. Ward Dawson, a San Francisco attorney who represented David Alison. Dawson talked to Frank about the charcoal brochure, a plan for issuance or sale of stock relating to Comstock Ltd., and a block of 500,000 shares of Comstock Ltd. [R. T. 684-687.]

This conversation is not hearsay because it was not offered for the truth of the matters asserted, but was merely introductory and offered to show the context within which Dawson and Frank were acting in relation to the appellants and the scheme to defraud. *Ortiz v. United States* (9 Cir. June 5, 1963), ... F. 2d ....., Number 18,253; *Busby v. United States* (9 Cir. 1961), 296 F. 2d 328.

However, if the telephone conversation is held to be hearsay it was still admissible under the "common scheme or plan" exception. In *Hitchman Coal & Coke Co. v. Mitchell* (1917), 245 U. S. 229, it was stated that:

> ". . . when any number of persons associate themselves together in prosecution of a common plan or enterprise, lawful or unlawful, from the very act of associating there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act

of all, and is admissible as primary and original evidence against them." p. 249.[5]

H. Ward Dawson was (1) the attorney for David Alison, (2) prepared the notes relating to the 500,000 shares of Comstock Ltd., (3) received 500,000 shares of Comstock Ltd. in early 1957, (4) delivered the 500,000 shares of Comstock Ltd. to David Alison, (5) attended a Comstock Ltd. meeting in Reno, Nevada, (6) received funds from Howard P. Carroll, (7) authorized Howard P. Carroll to withdraw Comstock Ltd.'s stock from the Denver escrow, (8) the Comstock Ltd. stock was withdrawn by Howard P. Carroll at the rate of one share for 25 cents paid to Dawson, and (9) Dawson forwarded the money received from Howard P. Carroll to David Alison. Ralph Frank was (1) the attorney for Howard P. Carroll and H. Carroll & Co. in California, (2) Frank was the resident agent for H. Carroll & Co. in California, (3) Frank represented H. Carroll & Co. before the California Corporation Commission, (4) Frank attended various meetings at the Beverly Hilton hotel concerning H. Carroll & Co., including the sales meeting relating to Comstock Ltd., (5) Frank examined a mock-up of the charcoal brochure, (6) Frank presented the charcoal brochure to the California Corporation Commission for approval as selling literature, (7) Frank was informed by the California Corporation Commission that the brochure was disapproved as selling literature, and (8) Frank advised Howard P. Car-

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[5]See also: *Lutwak v. United States* (1953), 344 U. S. 604; *Ortiz v. United States, supra; Williams v. United States* (9 Cir. 1961), 289 F. 2d 598; *Fuentes v. United States* (9 Cir. 1960), 283 F. 2d 537.

roll and H. Carroll & Co. on the Comstock Ltd. stock venture.[6]

It is to be noted that not withstanding the analysis previously presented the conversation between Frank and Dawson was merely cumulative of other testimony concerning the charcoal brochure and the block of 500,000 shares of Comstock Ltd.

The Government respectfully submits that the conversation between Frank and Dawson (1) was not hearsay, (2) if hearsay was subject to an exception to the hearsay rule, and (3) was merely cumulative.

D. There Was No Error Committed in the Procedures Employed by the Trial Court.

1. Leading Questions.

The appellants contend that counsel for the Government committed reversible error by asking leading questions.

The definition of a leading question is found in Wigmore on Evidence, Third Edition, Volume III, Section 769, and reads, in pertinent part, as follows:

> "LEADING QUESTIONS: (1) GENERAL PRINCIPLE. On the direct examination, i.e. by counsel of the party in whose favor the witness is called, the most important peculiarity of the interrogational system is that it may be misused by *suggestive questions* to supply a false memory for the witness,—that is, to suggest desired answers not in truth based upon a real recollection. The problem is to discriminate between the forms of questions which will too probably have that

[6]See Court's instructions on "common scheme or plan" and on "agency." [R. T. 992-995.]

> effect and those which will not. Questions may legitimately suggest to the witness the *topic* of the answer; they may be necessary for this purpose where the witness is not aware of the next answering topic to be testified about, or where he is aware of it but its terms remain dormant in his memory until by the mention of some detail the associated details are revived and independently remembered. Questions, on the other hand, which so suggest the *specific tenor of the reply as desired by counsel* that such a reply is likely to be given irrespective of an actual memory, are illegitimate.
>
> "The essential notion, then, of an improper (commonly called a leading) question is that of a question which *suggests the specific answer desired.* . . ." [Footnote omitted.] p. 122.

A close examination of the questions asked by counsel for the Government leads to the conclusion that the questions did not in the main suggest the specific answer desired.

The general rule is that the trial court has a wide discretion in permitting or forbidding leading questions. A conviction will not be reversed except where the Trial Court has grossly abused this discretion. *Northern Pacific RR Co. v. Urlin* (1895), 158 U. S. 271; *St. Clair v. United States* (1894), 154 U. S. 134; *City-Wide Trucking Corporation v. Ford* (D.C. Cir. 1962), 306 F. 2d 805; *Mitchell v. United States* (9 Cir. 1954), 213 F. 2d 951, *cert. den.* 348 U. S. 912; *United States v. Montgomery* (3 Cir. 1942), 126 F. 2d 151, *cert. den.* 316 U. S. 68; and Wigmore on Evidence, Third Edition, Volume III, Section 770.

It is to be noted that many of the witnesses called by the Government were friends, employees and business associates of Howard P. Carroll. The demeanor of the witnesses was accurately summarized by the Trial Court's statement, out of the presence of the jury, that:

> ". . . Counsel has had a pretty difficult time with some of these witnesses. I have seen a good many witnesses in the courtroom and I have seen rare occasions where there were more evasive witnesses than we had in this case. An occasion may come to deal with that later, I don't know. . . ." [R. T. 636.][7]

The Government respectfully submits that the Trial Court did not abuse its discretion in its rulings on objections directed to the form of questions asked in the case at bar.

2. Questions by the Trial Court.

Appellants contend that the Trial Court committed error by participating in the trial and by evidencing his belief in the guilt of the defendants by assisting the prosecution in the presentation of the case on trial.

The general rule concerning the Trial Court's questioning of witnesses is found in *Ochoa v. United States* (9 Cir. 1948), 167 F. 2d 341, and reads as follows:

> ". . . it is the right and duty of the Federal trial judge to facilitate, by direct participation, the orderly progress of a trial. Queries by the judge which aid in clarifying the testimony of witnesses, expedite the examination or confine it to relevant matters in order to arrive at the ulti-

[7]See also R. T. 231-233, 823.

> mate truth, are eminently proper so long as this authority is exercised in a nonprejudicial manner. . . . p. 344. [Citations omitted.][8]

An examination of the record in this cause shows that the Trial Court asked questions of the various witnesses in order to (1) clarify witness testimony, (2) expedite the examination of witnesses, and (3) in order to confine the examination of witnesses in order to arrive at the ultimate truth.[9]

Appellents rely on the cases of *Bollenbach v. United States* (1946), 326 U. S. 607; *United States v. Fry* (7 Cir. 1962), 304 F. 2d 296; *United States v. Marzano* (2 Cir. 1945), 149 F. 2d 923; *Gomila v. United States* (5 Cir. 1944), 146 F. 2d 372; *Williams v. United States* (9 Cir. 1937), 93 F. 2d 685.

In the *Bollenbach* case, *supra,* the Supreme Court reversed because of an improper jury instruction. In the *Fry* case, *supra,* the Trial Court asked over 1210 questions which ridiculed the defendant and his witnesses, and led the appellate court to the conclusion that the Trial Court believed the defendant was guilty. In the *Marzano* case, *supra,* the Trial Court called two codefendants who had pleaded guilty as witnesses and the Trial Court by its extensive examination of the two codefendants led the appellate court to the conclusion that the Trial Court disbelieved the two co-

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[8]See also: *United States v. Rosenberg* (2 Cir. 1952), 195 F. 2d 583, *cert. den.* 344 U. S. 838; *Pariser v. City of New York* (2 Cir. 1945), 146 F. 2d 431; *United States v. Warren* (2 Cir. 1941), 120 F. 2d 211; and Wigmore on Evidence, Third Edition, Volume III, Section 784.

[9]The Trial Court's examination of witnesses and the objections of counsel was the subject of a lengthy jury instruction. [R. T. 995-997.]

defendants and thus the defendant on trial was guilty. In the *Gomila* case, *supra,* the Trial Court erred in (1) an instruction concerning the presumption of innocence, (2) the procedure for handling the written question of the jury after deliberations had commenced, and (3) the extensive examination of an informer; which led the appellate court to conclude that the judge indicated to the jury his opinion that the defendants were guilty. In the *Williams* case, *supra,* one-third of the transcript (220 out of 675 pages), was examination by the Trial Court of various witnesses which included extensive examination of the defendants. In the *Williams* case, *supra,* this Court found error in the jury instructions, and error in the extensive participation of the Trial Court which conveyed to the jury the Trial Court's insistence on a conviction.[10]

The Government respectfully submits that the Trial Court in examining witnesses did not exceed the bounds of propriety in this case and the authority presented by the appellants is not applicable to the case at bar.

3. Argument of Objections.

Appellants contend that the Trial Court erred in requiring that arguments concerning the admissibility of evidence be made in the presence of the jury. The case authority which appellants rely on to sustain their position relates to extensive *witness testimony* concerning the validity of searches and seizures or the voluntary or involuntary nature of a confession. *Eierman v. United States* (10 Cir. 1930), 46 F. 2d 46, and cases cited.

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[10]The case of *Williams v. United States* (9 Cir. 1937), 93 F. 2d 685, is analyzed in Wigmore on Evidence, Third Edition, Volume III, Section 784, p. 153, footnote 2.

The Government submits that the *Eierman* case, *supra,* does not control the case at bar but rather the case of *Holt v. United States* (1910), 218 U. S. 245, controls. In the *Holt* case, *supra,* it was stated that:

> ". . . we are of opinion that it was within the discretion of the judge to allow the jury to remain in court. . . . No doubt the more conservative course is to exclude the jury during the consideration of the admissibility of confessions, but there is force in the judge's view that if juries are fit to play the part assigned to them by our law they will be able to do what a judge has to do every time that he tries a case on the facts without them, and we cannot say that he was wrong in thinking that the men before him were competent for their taste." pp. 249-250.[11]

The Supreme Court of the United States has held that matters of law concerning the admission or rejection of evidence may properly be considered by the Court and counsel for the respective parties while the jury is present.

This holding applied to the case before this Court leads to the conclusion that the Trial Court did not commit error in the procedures employed relating to the arguments of counsel concerning admission and rejection of evidence.

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[11]See also: *United States v. Varlack* (2 Cir. 1955), 225 F. 2d 665; *Keeney v. United States* (D. C. Cir. 1954), 218 F. 2d 843; *United States v. Holt* (Cir. Ct. W.D. Wash. 1909), 168 Fed. 141; and Cyclopedia of Federal Procedure, Third Edition, Volume 12, Section 48.121.

E. There Is Sufficient Evidence to Sustain the Conviction of the Appellants on All Counts.

Appellants contend that there is insufficient evidence to sustain their conviction.

It is of course a fundamental principle of law that all questions of credibility are for the trier of fact and not for the Appellate Courts. *Glasser v. United States* (1942), 315 U. S. 60; *Jelaza v. United States* (4 Cir. 1949), 179 F. 2d 202.

In determining whether the evidence is sufficient to sustain the conviction of the appellants, this Court is required to view the evidence in the light most favorable to the Government. *Glasser v. United States, supra* and *Mosco v. United States* (9 Cir. 1962), 301 F. 2d 180.

The evidence shows that the charcoal brochure was materially false. The charcoal brochure was paid for by Howard P. Carroll and was used extensively by the Beverly Hills Office of H. Carroll & Co. as selling literature.

Notwithstanding the charcoal brochure it is clear that material facts were concealed from the investors in Comstock Ltd. stock. 15 U. S. C. 77q(a)(2).

The investors were *not* told that Howard P. Carroll and H. Carroll & Co. purchased a substantial majority of the shares of Comstock Ltd. stock sold on the San Francisco Mining Exchange during the period alleged in the indictment at prices ranging from 27 cents to 36 cents per share.

Likewise the investors were *not* told that the Comstock Ltd. stock which they purchased from Howard

P. Carroll and H. Carroll & Co. came from a Denver escrow at 25 cents a share.

The activity on the San Francisco Mining Exchange coupled with the Denver escrow activity were facts which were concealed from the investors by Howard P. Carroll and H. Carroll & Co. This concealment was an ". . . omission to state a material fact . . ." 15 U. S. C. 77q(a)(2). *Coplin v. United States* (9 Cir. 1937), 88 F. 2d 652, *cert. den.* 301 U. S. 703.

The Government respectfully submits that there is overwhelming evidence of the guilt of Howard P. Carroll and H. Carroll & Co.

F. The Trial Court Did Not Commit Error in the Admission of Documentary Evidence.

1. Exhibit One.

Appellants contend that the Trial Court erred in receiving Exhibit One in evidence. Exhibit One is a carbon copy of six notes that David Alison delivered to Archie Chevrier. In return for the six notes Chevrier delivered 500,000 shares of Comstock Ltd. to Alison. This block of Comstock Ltd. stock ended up in a Denver escrow and Howard P. Carroll withdrew over 300,000 shares at 25 cents per share. The stock which Howard P. Carroll withdrew was sold to investors, primarily in the Los Angeles area. [R. T. 460-461, 715-716.]

In explaining this transaction to Marvin Greene, then an attorney employed by the Securities Exchange Commission, Howard P. Carroll mentioned the six notes.

The Government respectfully submits that Exhibit One was properly received in evidence to show the

background concerning the 500,000 shares of Comstock Ltd. in issue in this case. No authority contrary to the position of the Government has been presented for this Court's consideration by the appellants.

2. Exhibit 22.

Appellants contend that the Trial Court erred in receiving Exhibit 22 in evidence. Exhibit 22 is a letter written by a San Francisco attorney to Marvin Greene, formerly an attorney for the Securities Exchange Commission. Exhibit 22 was furnished at the request of Marvin Greene in order that the Securities Exchange Commission might determine the numbers of the stock certificates which comprised the 500,000 shares of Comstock Ltd. escrowed in Denver, Colorado.

Exhibit 22 was kept by the San Francisco office of the Securities and Exchange Commission in the ordinary course of business. The appellants objected to the admission of Exhibit 22 on the basis that it was (1) hearsay and (2) there was no proper foundation. [R. T. 460-465.]

The appellants do not contend, in light of Exhibit 27, that the information contained in Exhibit 22 is false, or that the 500,000 shares of Comstock Ltd. listed in Exhibit 22 were not ultimately placed in a Denver escrow. Rather appellants take the position that the technical requirements of Title 28, United States Code, Section 1732, were not complied with and therefore the entire case must be reversed.

In the case of *Bisno v. United States* (9 Cir. 1961), 299 F. 2d 711, this Court was faced with the following fact situation: *Bisno* had certain correspondence files which formed a part of his business records. Some

of the letters in the correspondence files were not written by *Bisno* but by other individuals. *Bisno* contended that Title 28, United States Code, Section 1732, did not apply to letters written by someone else and which were kept in his business file. In reply to this contention this Court stated that:

> ". . . We do not regard the Official Records Act as being so restrictive. This act permits the introduction into evidence of 'any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, or occurrence, or events * * * if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.' The mere fact that the memoranda taken from chronological files are in the form of letters does not operate to remove the material in Exhibits 58A-65A from the Official Records Act. Neither does the fact that some of the letters were not written by Bisno himself affect the admissibility of such letters under the act, since that act provides 'all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.'" p. 718.

The Government respectfully submits that the *Bisno* case, *supra,* controls and Exhibit 22 was properly received in evidence. However, if this Court were to restrict the holding in the *Bisno* case, *supra,* the ad-

mission of Exhibit 22 was harmless error because it was merely cumulative of other evidence.

The information found in Exhibit 22 is also found in Exhibit 27, which was identified by Clarence Scholz as containing receipts which he gave Securities Transfer Corporation for the shares of Comstock Ltd. stock that appellants withdrew from the escrow at 25 cents per share. These receipts contain the numbers of the stock certificates withdrawn by the appellants. The stock certificate numbers provide the basis for tracing the shares of stock purchased by the investors named in the indictment to the escrow at Securities Transfer Corporation.[12]

The conclusion of harmless error is supported by the case of *Gordon v. United States* (6 Cir. 1948), 164 F. 2d 855, *cert. den.* 333 U. S. 862. In the *Gordon* case, *supra,* the Court stated:

> "We question whether the letter written by Walter Ollendorff to his brother, an officer of the Ollendorff Watch Company, with reference to this robbery was properly introduced in evidence. It was admitted upon the ground that it was made in the regular course of business within the meaning of 28 U.S.C. § 695.
>
> "The alleged report was a highly personal account, written in familiar terms. While it stated the approximate number of pieces lost, as reported by Walter Ollendorff to the insurance agent, it hardly bore the ear-marks of a business report. Appellant contends that under the doctrine of

[12]See Exhibit 28 which contains the same information as found in Exhibit 22.

> Palmer v. Hoffman, . . . no report of a jewelry loss is admissible under 28 U.S.C. 695, . . . Appellee urges that reports of thefts of jewelry stock are necessarily made in the systematic conduct of the jewelry business and that the letter was thus clearly admissible.
>
> "We see some factual distinction between the situation presented here and in Palmer v. Hoffman, . . . It is the business of a jewelry company to sell its goods, and reports of losses of its stock would appear to be not only a necessary, but an integral part of the business itself. The letter in question is not, however, typical of entries 'made systematically or as a matter of routine,' and we therefore conclude that within the rule in Palmer v. Hoffman, . . . the evidence was not competent. Its admission was in no way prejudicial, for it was merely cumulative of other competent and unimpeached testimony." p. 858.[13]

3. Exhibits 28, 29, 30 and 31.

The appellants contend that the Trial Court erred by receiving Exhibits 28, 29, 30 and 31 in evidence.

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[13]See *Bailey v. United States* (9 Cir. 1960), 282 F. 2d 421, *cert. den.* 365 U. S. 228; *Stevens v. United States* (9 Cir. 1958), 256 F. 2d 619; *Papadakis v. United States* (9 Cir. 1953), 208 F. 2d 945; *Stillman v. United States* (9 Cir. 1949), 177 F. 2d 607; *Haid v. United States* (9 Cir. 1946), 157 F. 2d 630; *Coplin v. United States* (9 Cir. 1937), 88 F. 2d 652, *cert. den.* 301 U. S. 703; *United States v. Simmons* (2 Cir. 1960), 281 F. 2d 354; *United States v. Morello* (2 Cir. 1957), 250 F. 2d 631; *United States v. Quong* (6 Cir. 1962), 303 F. 2d 499, *cert. den.* 371 U. S. 863; *Thomas v. United States* (8 Cir. 1960), 281 F. 2d 132, *cert. den.* 364 U. S. 904; *Finnegan v. United States* (8 Cir. 1953), 204 F. 2d 105, *cert. den.* 346 U. S. 821; *Hartzell v. United States* (8 Cir. 1934), 72 F. 2d 569, *cert. den.* 293 U. S. 621.

Exhibits 28, 29, 30 and 31 are the records of Nevada Transfer Agency relating to the various stock transfers of Comstock Ltd. The appellants stipulated that the exhibits previously referred to are a part of the official records of Nevada Transfer Agency relating to Comstock Ltd.

The appellants objected to the admission of the exhibits because of (1) the best evidence rule and because (2) the exhibits are not within the purview of Title 28, United States Code, Section 1732. The Trial Court received the exhibits in question for the limited purpose of showing the flow of Comstock Ltd.

Appellants rely on *Neiderkrome v. C.I.R.* (9 Cir. 1958), 266 F. 2d 238. In the *Niederkrome* case, *supra,* the Tax Court admitted in evidence the minutes of a meeting of the executive committee of a corporation not connected in any way to the appellants. No testimony was elicited that the minutes were the minutes of the executive committee. The minutes received in evidence concerned a loan which had not been consummated and which was only in the negotiation stage. The loan involved in the minutes was not carried out in the form outlined in the minutes.

In this case the exhibits refer specifically to Howard P. Carroll and H. Carroll & Co. and the shares of Comstock Ltd. handled by H. Carroll & Co. The *Neiderkrome* case, *supra,* dealt with records relating to a corporation in no way connected to the appellant, while this case concerns records which clearly relate to Howard P. Carroll and H. Carroll & Co. and in particular Comstock Ltd.

The Government respectfully submits that the exhibits in question were properly received under Title 28, United States Code, Section 1732.[14]

4. Exhibits 18 and 104.

Appellants contend that the Trial Court erred in receiving Exhibit 18 and Exhibit 104 in evidence. Exhibit 18 is a series of H. Carroll & Co. confirmations relating to the order of Comstock Ltd. stock by Howard P. Carroll and H. Carroll & Co. on the San Francisco Mining Exchange. Exhibit 18 was identified by Liboslav Uhlir, an accountant for H. Carroll & Co. during 1957, as similar to the confirmations that crossed his desk. Gaither Lowenstein, an employee of Archie Chevrier during 1957, identified Exhibit 18 as the corresponding broker to the trades which Archie Chevrier confirmed. Lowenstein said that Exhibit 18 was Archie Chevrier's confirmation. Exhibit 18 was objected to by the appellants on the basis of no proper foundation and hearsay. The Trial Court ruled that sufficient foundation had been laid to connect the appellants to Exhibit 18, and it was received in evidence. [R. T. 706-711, 733-734.]

The Government respectfully submits that the Trial Court did not err in receiving Exhibit 18 in evidence in that Uhlir stated similar confirmations crossed his desk when employed by H. Carroll & Co. and Lowenstein identified Exhibit 18.

Exhibit 104 is a group of documents consisting of receipt copies which are mailed with securities, confirmations of trades and the draft attached of the

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[14]See: *Stillman v. United States* (9 Cir. 1949), 177 F. 2d 607.

securities which were mailed on the pink copy. Lowenstein identified Exhibit 104 as part of the records of Archie Chevrier which were kept in the ordinary course of business. The appellants objected to Exhibit 104 on the grounds that there was no foundation and the exhibit was not material, relevant, or competent to prove any matter in issue. [R. T. 727-729.]

There can be no doubt that the requirements of Title 28, United States Code, Section 1732, were complied with as to Exhibit 104. *Bisno v. United States, supra.* Exhibit 104 was a record of Archie Chevrier kept in the ordinary course of business.

Of course Exhibit 104 was relevant, competent and material to show the activity of Howard Carroll and H. Carroll & Co., during the period alleged in the indictment, on the San Francisco Mining Exchange, while at the same time withdrawing stocks from a Denver escrow at 25 cents per share.

The Government respectfully submits that Exhibits 18 and 104 were properly received in evidence.

5. Exhibits 105 and 106.

The appellants contend that the Trial Court erred in the admission of Exhibit 105 and the testimony of Howard Sillick, an employee of the Securities and Exchange Commission, concerning Exhibit 105. Exhibit 105 was compiled primarily from Exhibit 31, part of the records of Nevada Transfer Agency. [R. T. 741, 743, 773.] Exhibit 105 traces the shares of stock received by the investor witnesses to its place of origin. The tracing process shows that the stock received by the investor witnesses was purchased from Securities Transfer Corporation, the organization which handled

the escrow of 500,000 shares of Comstock Ltd. which Howard P. Carroll had the option to withdraw at 25 cents per share.

The Trial Court instructed the jury thoroughly on the impact of an accountant's testimony in the case at bar. The Trial Court detailed the fact that the testimony of an accountant is only explanatory of documents and other testimony received in evidence. The Trial Court clearly informed the jury that the summaries made by an accountant are not in and of themselves evidence. The Trial Court also instructed the jury to disregard the summaries of an accountant if they are inaccurate. [R. T. 767, 989-990.]

Any inaccuracy which appears in Exhibit 105 is for the consideration of the jury. Cross-examination is the proper method of pointing out an inaccuracy in an accountant's summary.

The Government submits that the summary presented in Exhibit 105 was properly received in evidence. *Corbett v. United States* (9 Cir. 1956), 238 F. 2d 557; *Noell v. United States* (9 Cir. 1950), 183 F. 2d 334, *cert. den.* 340 U. S. 921.[15]

Exhibit 106 is a compilation of Exhibit 104, the records of Archie Chevrier concerning purchases by Howard P. Carroll and H. Carroll & Co. on the San Francisco Mining Exchange during the period alleged in the indictment, and Exhibits 32, 33, 34, 79, and 104, the records of the San Francisco Mining Exchange concerning the total sales of Comstock Ltd. stock dur-

[15]Even if Exhibit 22 was not properly received in evidence the Government submits that Exhibit 27, and the harmless error analysis previously considered controls.

ing the period alleged in the indictment on the San Francisco Mining Exchange. [R. T. 755, 758.]

Again, inaccuracy in this type of compilation raises a question for the jury and is the proper subject of cross-examination.

Exhibit 106 shows that the appellants purchased over 80,000 shares of Comstock Ltd. stock out of total sale of over 130,000 shares of Comstock Ltd. stock during the period alleged in the indictment. These purchases coupled with the testimony concerning the Denver escrow during the period alleged in the indictment show fraud in the sale of securities on the part of Howard P. Carroll and H. Carroll & Co. *Coplin v. United States* (9 Cir. 1937), 88 F. 2d 652, *cert. den.* 301 U. S. 703.

The Government respectfully submits that Exhibit 106, as well as Exhibit 105, was properly received in evidence by the Trial Court.

G. The Trial Court Did Not Commit Error in Its Instructions to the Jury.

The appellants contend that the Trial Court erred in failing to give favorable defense instructions. Of course the issue is not whether or not the Trial Court failed to give favorable defense instructions (or favorable Government instructions), but whether or not the instructions given were a correct and complete statement of the applicable law.

After the Trial Court finished instructing the jury, counsel for the appellants requested that certain additional instructions be given. The Trial Court recalled the jury and the additional requests by counsel for the appellants were given the jury. Counsel for the ap-

pellants did not object to the instructions given. In fact counsel for the appellants stated his satisfaction with the jury charge. [R. T. 1001-1011.]

Since there was no objection made to the jury charge the only question before this Court is whether or not the instructions when taken as a whole and read together indicate that the Trial Court committed plain error. Federal Rules of Criminal Procedure, Rule 30; *Walker v. United States* (9 Cir. 1962), 298 F. 2d 217.

The Government respectfully submits that the jury instructions, when taken as a whole and read together, show that the Trial Court in a clear and concise fashion accurately instructed the jury concerning the law applicable to fraud in the sale of securities.

VI.
CONCLUSION.

The Government respectfully submits that the jury verdict convicting the appellants on all counts should be affirmed by this Court.

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

JOHN A. MITCHELL,
Assistant United States Attorney,